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May 13, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Room TW-A325
Washington, D.C. 20554

Re: In the Matter of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204

Dear Ms. Dortch:

On behalf of the State Broadcasters Associations ("State Associations") identified at footnote 1 of their Joint Petition for Reconsideration and Clarification ("Joint Petition"), this is to respond to the letter dated April 21, 2003 (the "Letter") from the National Organization for Women, NOW Legal Defense and Education Fund, Feminist Majority Foundation, Philadelphia Lesbian and Gay Task Force, and the Women's Institute for Freedom of the Press (collectively, "NOW"), that was directed to your attention in connection with the above-referenced matter.

Stripped to its essence, NOW's Letter is both an attempt to deny this proceeding a complete record and an unwarranted attempt to discredit the State Associations and their counsel. NOW's tactics are inappropriate and should not be allowed to succeed.

Length of Joint Consolidated Reply

It is apparent that NOW would like the Commission to reject the State Associations' "Joint Consolidated Reply To The Two Partial Oppositions Filed Against The Forty-Plus State Broadcasters Associations' 'Joint Petition For Reconsideration And Clarification'" ("Joint Consolidated Reply") on the ground that it exceeds "the page limit." Letter at 1. Notwithstanding NOW's lengthy footnote in support of such action, the Joint Consolidated Reply presented fully the legally adequate public interest justifications for consideration of the pleading and expressly requested any necessary waiver for the reasons stated. Specifically, at page 4, footnote 1, the Joint Consolidated Reply stated:

"Section 1.49(d) of the FCC's Rules provides that exhibits to a pleading will not be counted against any page limit. In any event, due to the importance of this proceeding, the extensive and detailed nature of the new regulations, the decision of the Commission

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not to make public a set of the regulations during the comment period, the number of drafting errors, ambiguities and other defects discovered in the regulations as adopted, the vigorous opposition of MMTC and NOW to a number of proposed changes and clarifications, the need to address each opposition completely, and the need to insure a complete record, it is simply impossible to provide a reasonably adequate reply without being able to submit Exhibit A to the Commission at this time. Accordingly, any necessary waiver of the Commission's regulations is hereby requested for the reasons stated."

Not only would the public interest in this proceeding be adversely affected if full and fair consideration of the State Associations' Joint Consolidated Reply were declined, it would also be inappropriate to do so in circumstances where NOW and others are engaged in *ex parte* communications, with leave behinds and the like which, if they were "counted," would have the effect of causing their original filings to exceed applicable "page limits."

Allegation of "Apparent Misrepresentations"

NOW's second tactical ploy should not be allowed to prevail. NOW is seeking to discredit the State Associations and their counsel by trying to elevate disagreements over the characterizations of their respective positions into "apparent misrepresentations." Letter at 1-3. Significantly, NOW fails to show any intent to mislead the Commission.¹ The public effort by one party to characterize the public position of another party is inherent in vigorous advocacy. Notwithstanding this, the respective positions of the parties are a matter of public record and thus the decision maker, as here, can decide for itself what position each party has taken in connection with each issue. The following review of NOW's allegations well illustrates that there were no misrepresentations, apparent or real.

1. In its Letter, NOW argues that contrary to the State Associations' "claims," NOW "strongly *encourage[s]* use of Internet recruitment, especially when used in conjunction with other traditional forms of outreach." Letter at 2. In its Joint Consolidated Reply, the State Associations stated: "Of great concern to the State Associations is NOW's apparent position that the Commission should not even use its Prong 3 credit program to encourage broadcasters to make more use of the Internet for recruitment. Everyone but NOW seems to accept the Internet's utility for many purposes including as a very valuable resource for job-related information."

¹ According to Commission precedent, "misrepresentation" is composed of two elements: a material false statement made to the Commission and an intent to deceive. See, e.g., *In re Applications of Stockholders of CBS, Inc.*, 11 FCC Rcd 3733 (1995); *Fox River Broadcasting, Inc.*, 93 FCC 2d 127 (1983). NOW has not claimed, because it cannot, that either element has been met here.

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Joint Consolidated Reply at 7. In addition, the State Associations rebutted the numerous criticisms which MMTC and NOW raised concerning Internet recruitment. *See* Joint Consolidated Reply, n.2. The State Associations maintain their position that NOW has still not squared its opposition to a Prong 3 credit for supplemental Internet outreach with its current statement that it “encourages” use of Internet recruitment. Under Prong 1, Internet recruitment is not required. A Prong 3 credit will stimulate and thus *encourage* wider use of Internet recruitment to the benefit of millions of potential job seekers, a credit which NOW continues to oppose. None of this presents any basis for NOW’s charge of misrepresentation.

2. In their Joint Petition, the State Associations made two separate requests. They requested that Subsection (c)(1) of the new EEO Rule be modified to say the following: “Recruit for every full-time job vacancy in its operations except in cases of internal promotions and where exigent circumstances exist.” *See* Joint Petition at 14-15; Joint Consolidated Reply, Exhibit A, at 4. The State Associations also asked the FCC to include a definition of the term “exigent circumstances” in the new EEO Rule. *See* Joint Petition at 13; Joint Consolidated Reply, Exhibit A, at 29-30. In its Letter, NOW argues that the State Associations “incorrectly” stated that NOW did not object to the first change and only objected to the inclusion of a definition of “exigent circumstances.” Letter at 2. The State Associations have once again carefully reviewed NOW’s Opposition. It still appears that NOW did not state any objection to the first change and simply focused on the issue of whether the new EEO Rule should include a definition of “exigent circumstances.” Indeed, NOW’s Opposition deals only with the definition of the term “exigent circumstances,” and argues that no definition of the term should be included in the new EEO Rule, and certainly not the State Associations’ definition. If NOW wishes to change its position at this time, it is free to do so. However, such change is no basis for a claim that the State Associations misrepresented the fact that NOW did not object to the first change in its Opposition.

3. In its Letter, NOW argues that despite the State Associations’ “claims,” NOW did not “solely” rely upon the Declaration of Eduardo Pena in demonstrating that the new EEO requirements were not burdensome, and stresses that it made other arguments as well. In their Joint Consolidated Reply, the State Associations stated that “MMTC and NOW essentially rely upon the Declaration of Eduardo Pena” in opposition to the State Associations’ position that “the new EEO Rule created numerous, substantial, unnecessary new burdens on and risks for broadcasters.” Joint Consolidated Reply at 8. NOW’s charge of misrepresentation is baseless for at least two reasons. First, Mr. Pena’s Declaration appears to be the only basis for NOW’s *factual* argument. Second, the Joint Consolidated Reply expressly rebutted, and therefore expressly acknowledged, NOW’s added *legal* arguments in opposition. *See* Joint Consolidated Reply at 2-3.

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4. In its Letter, NOW argues that contrary to the State Associations' "claim," NOW has opposed the State Associations' position that nonexempt SEUs should only be required to disclose in their annual EEO Public File Reports those referral organizations which had requested to be placed on a station's "mailing list" of job vacancies. Letter at 2. The State Associations correctly noted that MMTC had opposed that position. *See* Joint Consolidated Reply, Exhibit A, at 22-23. They incorrectly noted that NOW had not. *Id.* This was simple error. There was no intent to deceive. NOW's position was and remains a matter of public record before the Commission in this proceeding for all to evaluate.

5. In its Letter, NOW argues that the State Associations should have mentioned that it opposed the State Associations' position that nonexempt SEUs should not be required to disclose in their annual EEO Public File Reports the referral sources of all interviewees and hirees. Letter at 2-3. MMTC's opposition was cited. *See* Joint Consolidated Reply, Exhibit A, at 25. NOW's position was not mentioned. However, in view of the fact that MMTC opposed the position, the most logical inference, if any could reasonably be drawn, was that NOW probably opposed it as well. In any event, NOW's position was and remains a matter of public record before the Commission in this proceeding. Thus, this example provides no basis for a charge of misrepresentation.

6. In its Letter, NOW states that student interns should not automatically be classified as temporary or non-employees for purposes of the EEO Rule and argues that the State Associations failed to mention that fact, thereby implying that NOW was in favor of such classification. *See* Letter at 3. The State Associations recited Commission precedent to the effect that the FCC historically has treated student interns as temporary employees or non-employee volunteers. *See* Joint Consolidated Reply, Exhibit A, at 29. The State Associations were not required to state that MMTC or NOW disagrees with that precedent. Again, this example is no basis for a charge of misrepresentation.

7. In its Letter, NOW states that it opposes counting as interviewees anyone who has been contacted only by e-mail and that, contrary to the State Associations' "claims," it has "taken no position regarding the need to hear someone's voice." Letter at 3. In the Joint Consolidated Reply, the State Associations have asked the Commission to rule that interviewing by e-mail should be acceptable under the new EEO Rule. *See* Joint Consolidated Reply, Exhibit A, at 8. The State Associations stated that MMTC opposed as unacceptable interviews conducted solely by e-mail and that NOW took the same position. *Id.* NOW does not appear to quarrel with the State Associations' basic characterization that NOW is opposed to allowing stations to count as an interview, communication with a prospective interviewee solely by e-mail. Any distinction between NOW's basic position and the fact that it has not taken a position on "the need to hear someone's voice" seems trivial as best. Once again, this example provides no basis for a charge of misrepresentation.

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Based on the foregoing, NOW's claims that the State Associations and their counsel have sought to misrepresent NOW's positions before the Commission in this proceeding are unfounded and unwarranted.

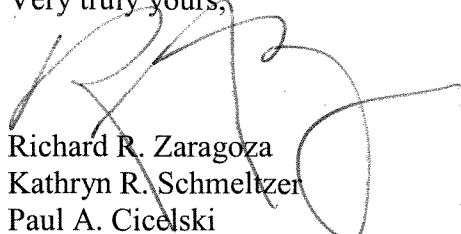
New Issues To Be Resolved

Finally, NOW argues that the Joint Consolidated Reply improperly contains new issues and arguments for the first time. *See* Letter at 3. The State Associations identified them as such, and discussed them since they were raised between the time when the Joint Petition was filed and the deadline for filing replies. The issues are: 1) continuous changes in the number of full-time employees; 2) unintentional discrimination; 3) treatment of inter-company employees; 4) promotion of interns; and 5) requirements of union agreements – all real world issues which the new EEO Rule has caused broadcasters to grapple with for the first time. The issues deserve to be addressed and resolved now, in a Memorandum Opinion and Order that is comprehensive and publicly available, rather than on an ad hoc basis where public notice of the action may not even be given. It is patently unreasonable for NOW to argue that the FCC should turn a blind eye to these concerns merely because broadcasters did not begin to confront them earlier under the new EEO Rule. NOW cannot have it both ways: if it expects the FCC to begin to enforce the new regulations, the FCC must resolve now the many issues raised. NOW, and all persons monitoring this proceeding, have the continuing opportunity to respond to these issues. NOW's choice to attack the State Associations, rather than provide useful comments on each such issue, should not bar the FCC from carefully considering all relevant matters in a proceeding of this importance.

In sum, the public has not been prejudiced by the State Associations' Joint Consolidated Reply as the entire pleading was structured as a good faith effort to help the FCC and the other parties inventory and review the many errors, ambiguities, and deficiencies contained in the Commission's new EEO Rule. The State Associations submit that if there is any unfairness in this proceeding, it is being borne by broadcasters who must fully comply with the new EEO regulations while they await official guidance on the many issues raised by the State Associations. This unfairness will be exacerbated if the Commission were to refuse to consider fully and fairly all of the issues raised by the State Associations.

Should you have any questions regarding this matter, please contact any of the undersigned.

Very truly yours,



Richard R. Zaragoza
Kathryn R. Schmeltzer
Paul A. Cicelski

cc: Chairman Michael Powell (FCC)
Commissioner Kathleen Abernathy (FCC)
Commissioner Jonathan Adelstein (FCC)
Commissioner Michael Copps (FCC)
Commissioner Kevin Martin (FCC)
Legal Advisor Susan Eid (FCC)
Legal Advisor Stacy Robinson (FCC)
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